(2)

No. 06-1625

IN THE
Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION, COMMITTEE TO REINSTATE DELAWARE WRESTLING, JUNIATA WRESTLING CLUB, COMMITTEE TO SAVE BUCKNELL WRESTLING, MARQUETTE WRESTLING CLUB, *AND* YALE WRESTLING ASSOCIATION,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION, MARGARET SPELLINGS, *IN HER OFFICIAL CAPACITY AS SECRETARY OF EDUCATION AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW*, STEPHANIE MONROE, *IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY FOR CIVIL RIGHTS AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW, AND* UNITED STATES OF AMERICA,

RESPONDENTS

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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TABLE OF CONTENTS

Table of Authorities ii
Petitioners Supplemental Brief 1
Argument 2
I. Title IX Cases Do Not Resolve Constitutional Issue 3
A. *Horner* Litigation 5
B. *Kelley* Litigation 5
C. *Cohen* Litigation 6
D. *Neal* Litigation 7
II. Constitutional Issues Need Resolution 7
Conclusion 10

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 2, 5, 6, 8

Bolling v. Sharpe, 347 U.S. 497 (1954) 3

Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999) 4

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993) 9

Buckley v. Valeo, 424 U.S. 1 (1976) 3

Chalenor v. Univ. of North Dakota, 291 F.3d 1042 (8th Cir. 2002) 4

City of Boerne v. Flores, 521 U.S. 507 (1997) 7

Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) 2, 6, 7, 8

Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) 2, 6, 7, 8

Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989) 9

Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia, 6 F.3d 990 (3rd Cir. 1993) 9

Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157 (2004) 4

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 6

Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 9, 10

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (*en banc*) 10

Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (2nd Cir. 1992) 9

Horner v. Kentucky High School Athletic Ass'n., 43 F.3d 265 (6th Cir. 1995) 5

Horner v. Kentucky High School Athletic Ass'n,
206 F.3d 685 (6th Cir. 2000) 5

Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994) 9

Johnson v. Bd. of Regents of the Univ. Sys. of Ga.,
106 F. Supp. 2d 1362 (S.D. Ga. 2000) 9

Kelley v. Bd. of Trustees, Univ. of Ill.,
35 F.3d 265 (7th Cir. 1994) 2, 4, 5, 7, 8

Metro Broadcasting, Inc. v. F.C.C.,
497 U.S. 547 (1990) 5, 6, 8

Miami Univ. Wrestling Club v. Miami Univ.,
302 F.3d 608 (6th Cir. 2002) 4

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982) 7-8

Neal v. Bd. of Trustees of the Cal. State Univ.,
198 F.3d 763 (9th Cir. 1999) 7, 8

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,
2007 WL 1836531 (June 28, 2007) 1, 2, 8, 9, 10

Pederson v. Louisiana State Univ.,
213 F.3d 858 (5th Cir. 2000) 4

Pers. Adm'r v. Feeney, 442 U.S. 256 (1979) 3

Regents of the Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 9

Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) 9

Roberts v. Colorado State Bd. of Agric.,
998 F.2d 824 (10th Cir. 1993) 4

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 6

U.S. v. Virginia, 518 U.S. 515 (1996) 3

Wards Cove Packing Co., Inc. v. Atonio,
490 U.S. 642 (1989) 10

Williams v. Sch. Dist. of Bethlehem,
998 F.2d 168 (3rd Cir. 1993) 4

Constitutional Provisions

Fifth Amendment, U.S. Const. amend. V 3, 6

Fourteenth Amendment,
U.S. Const. amend. XIV 1, 3-4, 5, 6, 8, 9

Statutes

20 U.S.C. §§1681-1687 ..... 2, 3, 4, 5, 6, 7, 8, 9

42 U.S.C. §1983 ..... 4, 8

Rules and Regulations

Sup. Ct. Rule 15.8 1

44 Fed. Reg. at 71,420 (1979) 6

Other Authorities

Equity in Athletics, Inc. v. Dep't of Educ.,
No. 5:07-0028-GEC (W.D. Va.), Fed. Defs.' Mot. to
Dismiss (July 12, 2007) 2

PETITIONERS SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 15.8, petitioners file this Supplemental Brief on the application here of *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 2007 WL 1836531 (June 28, 2007), which came down after the filing of the petition for a writ of *certiorari* dated June 4, 2007.

On June 28, 2007, this Court rejected the mechanical application of group "balancing" to the exclusion of individual equal-protection rights. *Parents Involved*, 2007 WL 1836531, *17 (rejecting quotas and balancing as ends in themselves) (plurality); *49 (Kennedy, J., concurring in part and concurring in judgment) (rejecting "plan... [that] relies upon a mechanical formula... on the basis of three rigid criteria"). Four dissenting justices considered *Parents Involved* to make new law. *Id.* at *52 (Stevens, J. dissenting); *id.* at *54 (Breyer, J., dissenting). If the *Parents Involved* schools' minor balancing of race (along with two non-suspect factors[1]) qualifies as unconstitutionally mechanical in its focus, *id.* at *19-*20, Petitioners respectfully submit that the Federal Respondents' systemic and exclusive reliance on a gender quota does not present even a close question under the Equal Protection Clause.

In what they call "copy-cat" litigation, the same Federal Respondents here filed a motion to dismiss that also serves as their opposition to the plaintiff's motion for interim relief against James Madison University's decision to cut ten

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[1] In addition to race, the Seattle plan considered siblings' placement and distance from schools. *Parents Involved*, at *49. As such, the Seattle Plan was a three-factor test, whereas the "Three-Part Test" at issue here offers three ways to rely on a single factor (gender).

athletic teams to comply with the Three-Part Test. *Equity in Athletics, Inc. v. Dep't of Educ.*, No. 5:07-0028-GEC (W.D. Va.), Fed. Defs.' Mot. to Dismiss, at 2-3 (July 12, 2007) ("Fed. Defs.' Opp'n"). In that brief, the Federal Respondents cavalierly argue that this Court's race-discrimination jurisprudence is *irrelevant* to gender discrimination:

> Cases involving the constitutionality of racial classifications, such as the recent Supreme Court decision in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, -- U.S. --, 2007 WL 1836531 (June 28, 2007), are not relevant to the instant case, which involves a gender-based classification. Racial classifications are reviewed under strict scrutiny, whereas gender classifications are reviewed under the less demanding intermediate scrutiny. *See Seattle School Dist.*, 2007 WL 1836531 at *11; *Cohen II*, 101 F.3d at 183-84; *Kelley*, 35 F.3d at 272.

Fed. Defs. Opp'n, at 36 n.9. As explained below, the Federal Respondents' citation to *Cohen* and *Kelley* rejects the application not only of *Parents Involved*, but also of *Adarand Constructors*, to gender-based discrimination.

ARGUMENT

Based on *Parents Involved* and its supposed irrelevance to gender discrimination, Petitioners make two arguments. First, the Three-Part Test's constitutionality is uncertain, notwithstanding (or, perhaps, because of) the deference that courts of appeal have granted the Federal Petitioners' procedurally invalid amendment by "interpretation" of the 1975 Title IX regulations. Second, the lower courts would benefit from this Court's clear rejection (or acceptance) of the proposition that the Court's race-based equal-protection

jurisprudence is irrelevant to gender discrimination.

I. TITLE IX CASES DO NOT RESOLVE CONSTITUTIONAL ISSUE

The Equal Protection Clause of the Fourteenth Amendment prohibits intentional gender-based discrimination (*i.e.*, actions taken *because of gender*, not those in spite of gender). *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). The Fifth Amendment's Due Process Clause includes an equal-protection component applicable to the federal government, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), which offers the same equal-protection guarantees as the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Under the intermediate scrutiny applicable to gender-based Equal Protection claims, governments can justify gender discrimination only to achieve "important governmental objectives," with the "discriminatory means... substantially related to [achieving such] objectives." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (interior quotations omitted). "The burden of justification is demanding and it rests entirely on the [government]." *Id.*

Although eight appellate courts have found the Three-Part Test lawful *under Title IX*, they devoted surprisingly little thought on the Three-Part Test's *constitutionality*. What little thought they have devoted relies on superseded Court decisions or case-specific facts. Often, when women sought to enforce their regulatory "rights" under the Three-Part Test,

the Equal Protection Clause simply did not come up.[2] Even more often, appellate courts have expressly declined to address the Equal Protection Clause's application to the Three-Part Test.[3] Because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents," *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)), the decisions cited in notes 2 and 3 cannot support the Three-Part Test's constitutionality. The next four sections explain why the remaining Three-Part Test decisions cannot support it either.

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[2] *See, e.g., Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (silent on constitutional issues); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 884 (5th Cir. 2000) (reaching only Title IX).

[3] *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 614 (6th Cir. 2002) ("Nothing in any version of the complaint can be construed as a direct [constitutional] challenge to either the law, the regulations or the Policy Interpretation"); *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042, 1049 (8th Cir. 2002) ("plaintiffs admit that they admit that they 'did not assert a constitutional violation' in the District Court..., so we need not decide the constitutional issue"); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999) ("availability of [Title IX] claim preempts the remedies available for sex discrimination under Section 1983"); *Kelley v. Bd. of Trustees, Univ. of Ill.*, 35 F.3d 265, 272 (7th Cir. 1994) ("plaintiffs' [constitutional challenge to school's cuts] is merely a collateral attack on the statute and regulations and is therefore impermissible"); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 176 (3rd Cir. 1993) (avoiding constitutional issue because "Congress intended to foreclose a right of action under section 1983").

A. *Horner* Litigation. Because it involved an effort to establish a new interscholastic sport for girls, the Sixth Circuit's *Horner* litigation did not directly present the discrimination issues that Petitioners raise here. *See Horner v. Kentucky High School Athletic Ass'n.*, 43 F.3d 265 (6th Cir. 1995) ("*Horner I*"). Moreover, by denying relief under the Equal Protection Clause in *Horner I,* but allowing it under the Three-Part Test, the *Horner* litigation demonstrates that the Equal Protection Clause protects against only actions taken because of gender, *Horner I,* 43 F.3d at 276, whereas the Three-Part Test overlays an affirmative "equal opportunity mandate," *Horner v. Kentucky High School Athletic Ass'n,* 206 F.3d 685, 694 (6th Cir. 2000). In drawing that distinction between the regulatory mandate for equal opportunity and the constitutional protection from intentional discrimination, the *Horner* litigation demonstrates that the Three-Part Test covers more than intentional discrimination, which is precisely Petitioners' point.

B. *Kelley* Litigation. Although the court considered "plaintiffs' [constitutional challenge to school's cuts] merely a collateral attack on the statute and regulations and... therefore impermissible," *Kelley v. Bd. of Trustees, Univ. of Ill.,* 35 F.3d 265, 272 (7th Cir. 1994), *Kelley* also briefly considered whether "Title IX and the applicable regulation – rather than the actions of the defendants – are unconstitutional." *Id.* Relying on *Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 565-66 (1990), to review "benign" classifications under lesser scrutiny, *Kelley* rejected that facial challenge out of hand. *Id.* Subsequent to *Kelley,* this Court overruled *Metro Broadcasting*'s treatment of benign classifications for race. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995) (overruling *Metro Broadcasting* to require same scrutiny for all classifications).

C. ***Cohen* Litigation**. Because Brown University is a private school not subject to the Fourteenth Amendment, its constitutional argument surfaced when the University raised a Fifth Amendment challenge to the Three-Part Test on behalf of its non-party male students. *See Cohen v. Brown Univ.*, 101 F.3d 155, 170, 181 & n.17 (1st Cir. 1996). The women plaintiffs challenged Brown's third-party standing to raise nonparties' equal-protection rights, which the court declined to consider, preferring to reach the merits. *Id.* In doing so, the *Cohen* court exceeded its jurisdiction, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), rendering its equal-protection analysis *dicta*.

In any event, *Cohen* analyzed the constitutional issue incorrectly. *First, Cohen* based its constitutional analysis on the Fifth Amendment's broad powers to remedy past discrimination, *Cohen v. Brown Univ.*, 991 F.2d 888, 901 (1st Cir. 1993), without recognizing that Congress adopted Title IX exclusively under the Spending Clause, not the Fifth Amendment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999). *Second,* just as Title IX lacked a congressional finding of past discrimination under the Fifth or Fourteenth Amendments, *Cohen* did not recognize that the agency expressly did not find universal discrimination. 44 Fed. Reg. at 71,420. *Third, Cohen* initially relied on the *Metro Broadcasting* decision that this Court overruled in *Adarand. Compare Cohen,* 991 F.2d at 901 *with* Section I.B, *supra. Fourth and finally, Cohen* disregarded *Adarand* both under the law of the case doctrine and because Brown had already been found guilty of discrimination. *See Cohen,* 101 F.3d at 183 (distinguishing between lawfulness of affirmative-action programs generally and of a court-ordered remedy after an adjudicated finding of discrimination).

For all of the foregoing reasons, *Cohen* cannot control

here on the constitutional issues. Petitioners have associational standing to raise their members' equal-protection rights; the schools have no adjudicated history of discrimination against female athletes, First Am. Compl. ¶22 (App. 73a); and, particularly as to the new plaintiffs, no law of the case or Court precedent constrains this Court's reaching a correct decision here.

D. *Neal* Litigation. Similarly, in *Neal v. Bd. of Trustees of the Cal. State Univ.*, 198 F.3d 763 (9th Cir. 1999), the school operated under a consent decree for past discrimination against women. *Neal,* 198 F.3d at 765. Indeed, *Neal* technically did not reach the constitutional merits, *Neal,* 198 F.3d at 772 (court would apply intermediate scrutiny "were we addressing the constitutional merits"). Instead, the *Neal* court merely "h[e]ld that the constitutional analysis contained [in *Kelley* and *Cohen*] persuasively disposes of any serious constitutional concerns" with the Three-Part Test as applied under the facts of that case. *Neal,* 198 F.3d at 772-73. Significantly, then, the *Neal* decision relies on *Kelley* and *Cohen* (distinguished in Sections I.B, I.C, *supra*) and involved a school with a past finding of intentional discrimination against women, which expressly does not apply here. First Am. Compl. ¶22 (App. 73a).

II. CONSTITUTIONAL ISSUES NEED RESOLUTION

Because the "power to interpret the Constitution in a case or controversy remains in the Judiciary," *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997), the Supremacy Clause compels reaching the important constitutional issues here:

> The fact that [a Title IX exemption] applies to [a school] provides the [government] no solace: "[A] statute apparently governing a dispute cannot be

> applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731-33 (1982) (first, second, and third alterations added).

As explained in Section I, the decisions that uphold the Three-Part Test have not resolved its constitutionality. *Kelley* simply disregarded an as-applied constitutional challenge to gender-conscious cuts as "impermissible," and *Cohen* lacked subject-matter jurisdiction over constitutional issues altogether. Both *Kelley* and *Cohen* relied on *Metro Broadcasting* for the discredited view that the Constitution views "good discrimination" more favorably than "bad discrimination." *Neal* simply relied on *Kelley* and *Cohen,* which (as just demonstrated) are deeply flawed.

Particularly in circuits that view Title IX to "preempt" §1983 actions on the Equal Protection Clause, Pet. at 30 & n.19, the weight of Three-Part Test authority impedes plaintiffs' ability to redeem their constitutional rights, notwithstanding the lack of credible constitutional authority to support the Three-Part Test. What district court or court of appeals wants to buck eight (or nine) courts of appeal? The constitutional issue here presents an important counterpoint to a circuit split: three-circuit unanimity that falsely resembles eight-circuit unanimity, but is plainly wrong.

But even if the First, Seventh, and Ninth Circuits (and the Federal Respondents) are right – *i.e.*, even if *Parents Involved* and *Adarand Constructors* do not apply in gender cases – this Court should say so. That resolution would clarify the law and resolve splits of authority on the application of intermediate scrutiny in gender discrimination.

The lower courts (and the parties here) are split on whether and how the general principles of this Court's race-discrimination jurisprudence apply to gender discrimination. For example, "[u]nder the [post-*Croson*] precedent in [the Sixth] Circuit, gender based affirmative action plans are subject to strict scrutiny when challenged under the Equal Protection Clause." *Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993). Similarly, the Ninth Circuit has applied strict scrutiny to Title IX because Title IX mirrors Title VI, which *Bakke* held to require strict scrutiny. *Jeldness v. Pearce*, 30 F.3d 1220, 1227-28 (9th Cir. 1994); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1367 (S.D. Ga. 2000) (same). By contrast, other circuits have applied intermediate scrutiny to gender-conscious remedial plans. *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994) ("Intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases"); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1010 (3rd Cir. 1993) ("applying *Croson*'s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny"); *see also Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 62 (2nd Cir. 1992) (recognizing circuit split and that "appropriate standard of review concerning gender-based set-asides remains unclear").

The lower courts also have split on the evidence required to support remedial discrimination and, specifically, whether such remediation requires past discrimination. *Compare Ensley Branch*, 31 F.3d at 1580 ("Under the intermediate scrutiny test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself") *with Conlin v.*

Blanchard, 890 F.2d 811, 816 (6th Cir. 1989) ("for a... sex based remedial measure to withstand scrutiny under the fourteenth amendment there must first be some showing of prior discrimination by the governmental entity involved").

Even more puzzling than scrutiny itself are the contours of the interests to which to it applies: the "distinction between an 'important interest' under intermediate scrutiny and a 'compelling interest' under strict scrutiny" remains "unclear," *Grutter v. Bollinger*, 288 F.3d 732, 742 n.7 (6th Cir. 2002) (*en banc*), *aff'd* 539 U.S. 306 (2003). In the race cases, numerical balance is not an end in itself. *Parents Involved*, 2007 WL 1836531, *17 (plurality); *49 (Kennedy, J., concurring in part and concurring in judgment). The most obvious interest here (avoiding intentional discrimination) has no "substantial" relationship to a population-based quota that disregards athletic interest. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989) ("nonsensical" to measure alleged discrimination by comparing participation in specialized pursuits with general population). At least to Petitioners, it remains far from clear that gender balance justifies eliminating whole teams or individual athletes – even if self-funded – just to make the numbers look good.

CONCLUSION

In light of *Parents Involved* (and the cavalier federal response to it), the writ of *certiorari* should be granted.

August 10, 2007 Respectfully submitted,

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